SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 237.

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

SUPPLEMENTAL BRIEF

In Opposition to the Petition for the Writ of Certiorari.

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State of Tennessee.

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MAY IT PLEASE THE COURT:

Counsel for the respondent, State of Tennessee, requests permission to file this supplemental brief in opposition to the petition for writ of certiorari in this cause on the question of whether or not the petitioner was denied due

process of law by the identification procedure followed at the police headquarters shortly after the petitioner was taken into custody August 18, 1965, upon another charge.

Mrs. Margaret Work Beamer, who was raped about 9:00 p. m., January 22, 1965, was escorted to police headquarters by members of the police force who informed her that they had a suspect for her to view and determine if she could—whether or not he was the man who raped her. When the petitioner was brought into her presence after her arrival there, she looked at him and asked that he say the words "Shut-up, or I will kill you", whereupon she was able to positively and unequivocably identify the petitioner as her assailant (Tr. 17).

She was asked what characteristics petitioner had which enabled her to identfy him and she replied (Tr. 17):

> "Well, he has the voice of an immature youth—I call it an immature youth. I have teen-age boys—and that was the first thing that made me think it was the boy."

She further identified the petitioner in these words (Tr. 18-19):

> "No, when he placed his face against mine—that was another thing, his skin was rather smooth, as, you know, someone that didn't have to shave. His hair was the next thing.
>
> What about his hair?
>
> Sort of bushy.
>
> . . . . . .
>
> Yes, the hair—a little longer than it is now, but—at the time when I identified him it was a little longer——
>
> . . . . . .

What about his physique?

Well, as I said, the size. He had—well at the time he raped me, his shirt was unfastened, and he had a large kind of flabby abdomen and breasts."

Contrary to the insistence of counsel for the petitioner Mrs. Beamer did identify the petitioner as the person who raped her at the trial, particularly at page 60 of the transcript, when she replied, "Yes, he did. Yes, sir.", in response to the question, "Mrs. Beamer, I may have already covered this, but, to be sure, I want you to tell the jury whether or not the defendant actually penetrated your vagina with his sexual organ". There was but one defendant in the courtroom, so there is no doubt about who was being referred to when the word "defendant" was used. This happened or something similar to it happened throughout the trial.

Also, contrary to petitioner's contention, there is no basis for the insistence that the identification procedure was conducted in a manner which tended to suggest to Mrs. Beamer that the petitioner was the one who raped her, or that she was influenced to any extent by anything the police did or said in her identification of him; but, on the other hand, the record read fairly shows that Mrs. Beamer was exceedingly cautious in her identification of the petitioner and that her identification of him was most reliable. Counsel for petitioner would have this Court believe that Mrs. Beamer did not identify the petitioner until his picture appeared as the perpetrator of a similar offense in the **Nashville Tennessean** on the morning of August 18, 1965, but again a fair reading of the record shows beyond doubt that this contention is unwarranted or unjustified (Tr. 17 and 47). One State witness on cross-examination did indicate to the contrary (Tr. 41), but admitted on redirect examination that he did not know (Tr. 42).

In the first place, she viewed thirty to forty photographs of possible suspects (Tr. 39) and she was called or driven to City Hall for the purpose of identifying the person who raped her several times between the date on which she was raped and the date of the petitioner's arrest (Tr. 25 and 73). She never identified any suspect. The closest she came was the observation that one of the photographs portrayed a man who had features like the petitioner (Tr. 15).

The foregoing circumstance itself adds a great deal of credence to Mrs. Beamer's identification of the petitioner as her assailant when coupled with the undisputed evidence that petitioner had no police record until his arrest on August 17, 1965. Until that date (date of petitioner's arrest) they had no photographs of him for Mrs. Beamer to identify and he was not available for her to identify at City Hall during the period of time between commission of the offense and the petitioner's arrest.

Mrs. Beamer's daughter who saw the petitioner just after his attack upon her in their home could not identify the petitioner at the trial, but she was able to describe the person who attacked her mother as a large person, Negro, who had a young voice (Tr. 83-84). Her (Mrs. Beamer's) daughter corroborated her mother's testimony by testifying that petitioner on the occasion wore a short sleeved shirt and petitioner "said he would kill me and her both" (Tr. 84).

One reason advanced to show that petitioner was denied "due process" during his identification is that he was sixteen years of age, had a ninth grade education and no police record (Petitioner's Brief, Pages 15-16). (The record does not show the extent of his education.) The record does not indicate that Mrs. Beamer identified petitioner because of his inexperience or lack of education

but because of his physical appearance and the sound of his voice.

Before **United States v. Wade**, 87 S. Ct. 1926, **Gilbert v. California**, 87 S. Ct. 1951, and **Stovall v. Denno**, 87 S. Ct. 1967, there may have been grounds for insisting that requiring petitioner to speak before Mrs. Beamer violated his Fifth Amendment right not to give evidence against himself and such an argument was the basic argument made in petitioner's behalf even on appeal before the State Supreme Court, but since the decision on those cases there no longer remains any room for such an argument.

It is not suggested what an attorney or relatives might have done in this particular case had they been present. They certainly could not have objected to petitioner's being required to talk and if petitioner had been placed in a lineup Mrs. Beamer surely would have been able to identify him. She had looked at suspects and photographs of suspects for a period of nearly seven months and had made no erroneous identification of any of them. Exhibiting suspects to a witness separately over a long period of time could very well be a greater safety measure for a not guilty person than placing them all in one line on one occasion.

Mr. Wall in his Treatise, **Eye-Witness Identification in Criminal Cases**, lists among a number of "danger signals" which he thinks might increase the probability of a mistaken identification the fact that a considerable period of time elapsed between the witness' view of the criminal and his identification of the defendant. Counsel for the respondent insist that such a conclusion if valid at all is not applicable in this case because Mrs. Beamer under the circumstances exhibited an attitude of coolness and clearness of mind that might have not been possible due to her being emotionally upset at the time or immediately after the incident occurred.

Some of the other "danger signals" listed by Wall were present in the identification of petitioner. The petitioner could not be identified by Mrs. Beamer's daughter and Mrs. Beamer had a limited opportunity to see the petitioner before the crime; but these are minimized by the totality of the circumstances, particularly the lack of any discrepancy between her description of him and his actual appearance and the fact that both petitioner and Mrs. Beamer were of the same race and the fact that Mrs. Beamer made a very positive identification of the petitioner after seeing him and hearing his voice.

The rule to be followed in this case since it came after the decisions in **United States v. Wade**, *supra*, and **Gilbert v. California**, *supra*, is found in **Stovall v. Denno**, *supra*, in these words:

> "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . ." (p. 1972).

In **Stovall**, the totality of the circumstances surrounding the confrontation in such a case seems to be the lack of any other alternative even though the identifying witness, Mrs. Behrendt, was in such a condition it could not be determined whether or not she would long survive the attack made upon her, a circumstance which incidentally might have rendered her identification most unreliable.

What amounts to "due process" depends upon the circumstances. In **Bradford v. School District No. 20**, 244 F. Supp. 768, 773, it was defined thusly:

> "What constitutes 'due process' within the meaning of the Fourteenth Amendment cannot be precisely

defined. It must be decided in the light of that which is just and reasonable, considering all factors, and cannot unduly confine those officials who have the responsibility of governing. As stated by Mr. Justice Frankfurter in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 163, 71 S. Ct. 624, 644, 95 L. Ed. 817 (1951):

> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.'"

The totality of the circumstances surrounding the identification of the petitioner in this case is not inconsistent with the foregoing principle. The burden is upon petitioner to show that the procedure followed was in fact unfair to the petitioner. This they have been unable to do. An investigation extending over several months cannot as a practical matter be done with all the safeguards and finesse that may be employed when only one "real hot" prospect and one investigation is involved. To follow such procedure in an extended type of investigation more general than specific would involve an enormous amount of time and police man hours, more than perhaps any municipal police force has available; nor is such an abundance of caution necessary in an investigation as this was, one in which neither the police nor the victim appear to be highly emotional and excited to the extent that they are determined to have some person identified as the offender.

In view of all the foregoing, counsel for the State of Tennessee insist that the petition for certiorari in this

cause should be dismissed and the judgment of the Tennessee Supreme Court left undisturbed.

Respectfully submitted,

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State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
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Certificate of Service.

I, Thomas E. Fox, Deputy Attorney General of the State of Tennessee, certify that I have mailed copies of the foregoing supplemental brief in opposition to the petition for writ of certiorari to:

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on this the 5th day of December, 1967.

Thomas E. Fox,
Deputy Attorney General.